

MINUTES OF THE OPEN SESSION OF THE RHODE ISLAND ETHICS COMMISSION

January 25, 2011

The Rhode Island Ethics Commission held its 2nd meeting of 2011 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, January 25, 2011, pursuant to the notice published at the Commission Headquarters, the State House Library, and electronically with the Rhode Island Secretary of State.

The following Commissioners were present:

Barbara R. Binder, Chair Frederick K. Butler

Ross Cheit, Vice Chair Deborah M. Cerullo, SSND

J. William W. Harsch, Secretary* Edward A. Magro**

James V. Murray John D. Lynch, Jr.*

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden**** and Amy C. Stewart; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.**

At 9:08 a.m. the Chair opened the meeting. The first order of

business was a motion to approve minutes of the Open Session held on December 21, 2010. Upon motion made by Commissioner Butler and duly seconded by Commissioner Magro, it was unanimously

VOTED: To approve minutes of the Open Session held on December 21, 2010.

ABSTENTION: Ross Cheit.

The next order of business was a motion to approve minutes of the Open Session held on January 11, 2011. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was unanimously

VOTED: To approve minutes of the Open Session held on January 11, 2011.

ABSTENTION: James V. Murray.

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Katie J. Kleyla, a member of the East Providence City Council. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present.

***Commissioner Lynch arrived at 9:14 a.m.**

In response to Commissioner Cheit, the Petitioner indicated that she last worked for Mr. Foley in December 2010. Upon motion made by Commissioner Butler and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Katie J. Kleyla, a member of the East Providence City Council

ABSTENTION: John D. Lynch, Jr.

The next advisory opinion was that of George O. Steere, Jr., a Glocester Town Council member. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner Cheit, the Petitioner stated that he is in favor of the ordinance. In response to Chair Binder, the Petitioner represented that the Solicitor decided to grandfather-in existing units.

****Senior Staff Attorney D'Arezzo arrived at 9:25 a.m.**

In response to Chair Binder, Staff Attorney Stewart indicated that permits would still be required for existing units. Commissioner Cheit noted that the draft opinion seems to be written as if the

proposed ordinance would not affect the Petitioner because his use is pre-existing, which is not the case. He suggested that Staff redraft the opinion to take into consideration the facts presented today, as well as the language of the proposed ordinance. Chair Binder stated that safe harbor should be withdrawn, as she is not convinced that the Petitioner would receive safe harbor because he is part of the policy-making that will impact him. The Petitioner stated his belief that the proposed ordinance still would not impact him because of his distance from his neighbors. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Butler, it was unanimously

VOTED: To withdraw the draft opinion and request that Staff redraft the opinion in light of the facts presented today as to how the ordinance impacts existing uses.

*****Staff Attorney Leyden arrived at 9:30 a.m.**

The next advisory opinion was that of David Saurette, a Tiverton Planning Board member. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was not present. Commissioner Cheit questioned whether the class is 51 or if it really is 20. He expressed that he is not sure that the class exception does not apply but noted that it is odd that the Petitioner would be able to participate in the more general issue when it is so clear that he needs to recuse on the specific issue. Staff Attorney Stewart explained the

purpose of the proposed zoning changes and why the draft opinion looked at the whole area – the existing zone, the potential expanded zone and abutters thereto. In response to Commissioner Cheit, she stated that reasonable foreseeability is part of the draft analysis. In response to Commissioner Cerullo, Staff Attorney Stewart indicated that she spoke with the Petitioner and he represented that he believed that he could participate objectively because he viewed the proposal as for the benefit of the whole town. She noted that the Petitioner's mother-in-law is Planning Board member Carol Guimond, who has recused on the issue but recently inquired whether she would be able to participate.

Chair Binder expressed that the matter is vaguely problematic with just 20 people. In response to Commissioner Cerullo's inquiry regarding the numbers previously found to constitute a significant and definable class, Staff Attorney Gramitt explained that the Commission has employed a totality test over the past several years that looks at the following: 1) the description of the class; 2) the size of the class; 3) the function or official action being contemplated; and 4) the nature and degree of foreseeable impact upon the class and its individual members as a result of the official action. Commissioner Cheit expressed that there would seem to be an impact if the 20 properties would be allowed or disallowed a particular use. Chair Binder and Commissioners Cheit and Lynch commented that it is a small class. Commissioner Cheit observed that there is some distance between the Board and the decision-makers because the

Board is giving a recommendation to the Council.

In response to Commissioner Butler, Staff Attorney Stewart stated that there would be public hearings on the recommendations before the Council. Legal Counsel Alves advised that individual notice is given when the issue comes before the Council, whereas it is a general agenda item with no notice to individuals at the Planning Board level. Commissioner Cheit noted that the Petitioner is agreeing to recuse on the specific issue of abutting parcels, indicating that there is a conflict. Staff Attorney Stewart stated that the Petitioner's mother-in-law abuts 3 properties under consideration for district expansion. Commissioner Cheit observed that this is a small class, with the whole district being not much bigger than the individual parcels. Chair Binder stated her belief that it is problematic.

The Petitioner arrived at 9:45 a.m. In response to Commissioner Cheit, the Petitioner expressed his belief that the proposal would not have much impact on his in-laws' property, which they have owned for over 20 years. He stated that the proposal is about the town evaluating zones to see if they should be expanded, lessened, or if there is a need to adjust the usage. The Petitioner indicated that he is not a real estate agent so he does not know what making the properties commercial might do to their value. He noted that it could actually lower the values. Commissioner Cheit agreed. The Petitioner stated that he does not know how property located 1,000 feet away on a commercial road would impact his in-laws' property.

Commissioner Cheit expressed that it all goes back to the question of reasonable foreseeability. He stated that this seems to go beyond just bringing existing non-conforming uses in line with the zoning code.

Commissioner Cerullo stated that she is troubled with the distinction between the votes on the general and specific issues. The Petitioner stated that consideration of the more general issue will not affect that commercial use that currently exists there. Commissioner Magro pointed out that recusing on the specific issue does not impact setting the general parameters for the inner 13 properties. He noted that by setting the parameters for the larger group you set the parameters for those 13. He questioned whether if one had a personal interest in how those 13 properties are used one could then set the general parameters so as to allow a particular use. Commissioner Cheit stated that the likelihood of that would not seem as great with a larger class. Commissioner Magro agreed.

Chair Binder inquired about past advisory opinions issued to the Providence Historic District Commission (PHDC) regarding their advisory nature. Senior Staff Attorney D'Arezzo replied that she is not aware of prior advisory opinions on the issue, but she discussed the Commission's dismissal of a complaint against Stephen Durkee last year, which was based, in part, upon the fact that the PHDC was making a recommendation to the City Council which it could accept or reject, and which required several subsequent public hearings

before the Council.

In response to Commissioner Cheit, Staff Attorney Stewart provided the Commission with a map of the existing district and proposed expansion thereto. Commissioner Cheit indicated that he would feel differently if the draft opinion did not hinge solely upon the class exception. Chair Binder agreed. Commissioner Cheit also noted that he would feel differently if the Petitioner were a member of the decision-maker. He stated that the draft opinion needs more explicit reference to the fact that the specific official action is advisory. Chair Binder expressed that she would like to see more about the advisory nature of the action fleshed out, with reference to prior opinions. Commissioner Cerullo inquired if the Commission were settling on the class being 51 or not. Chair Binder stated that to her the advisory nature of the action is significant.

*****Commissioner Harsch arrived at 10:08 a.m.**

In response to Commissioner Cheit, Staff Attorney Stewart confirmed that the subject property is lot #43. Commissioner Cheit indicated that the map is helpful because it shows that the expansion is not impacting lots # 42 and # 44. The Petitioner represented that some extreme peripheral lots are not just under consideration for inclusion in the district but as transitional zones with some commercial and some residential uses. Commissioner Cheit commented that it would make it less of an expansion, and more of bringing non-conforming

uses up to code.

He expressed that based upon the map it is a little less likely that there will be an impact on lot # 43. Commissioner Magro noted that part of the decision is how far to extend the district. Commissioner Cheit stated that the Town Planner chose not to include those lots. In response to Commissioner Cheit, the Petitioner stated that the Board is discussing the Planner's recommendation, rather than just taking an up or down vote.

Commissioner Lynch inquired what would happen if the owners of lot # 41 came in and said that they wanted to be included. Commissioner Magro stated that he does not believe that the specific plan is the issue, but the nature of the decision being made because it can change the proposal. Commissioner Cheit replied that it would make the map less important. In response to Chair Binder, Commissioner Cerullo stated that the advisory nature is not significant to her because the Petitioner recognizes that there would be a conflict to participate on the individual basis. She questioned why they would make an exception for the larger issue given the size of the class.

Staff Attorney Gramitt stated that he is not familiar with any prior opinions solely relying on an advisory nature analysis, and he noted that virtually all actions of a planning board are advisory to the city council. He noted the difficulty of preparing the draft opinion, which was based upon the class exception totality analysis. Upon motion

made by Commissioner Magro and duly seconded by Commissioner Lynch to adopt the draft opinion, there was discussion.

Commissioner Lynch stated his belief that the impact is indirect based upon a foreseeability factor. He indicated that the Petitioner would only need to recuse on the abutting properties. In response to Commissioner Lynch, the Petitioner stated his belief that only 3% of the town is zoned commercial. Chair Binder stated that she has a similar perspective as Commissioner Lynch. She noted that the Petitioner must recuse on the specific parcels, but the general issue is advisory. Commissioner Lynch stated that it would not change his opinion if it were the Town Council rather than the Planning Board. Chair Binder suggested the inclusion of another paragraph discussing the indirect impact and the fact that the official action is advisory. Commissioner Cerullo expressed her discomfort with the class exception. She stated her belief that there is a foreseeable impact on the class and the individuals. She indicated that she is not as persuaded by the fact that it is a recommendation to the Council. Commissioner Butler inquired as to the Planning Board's latitude to expand or retract the recommendation to the Council. Commissioner Magro added that it could be completely rewritten. Upon the original motion, it was

VOTED: To adopt the draft opinion.

AYES: James V. Murray and John D. Lynch, Jr.

NOES: Deborah M. Cerullo SSND, Frederick K. Butler, Edward A. Magro, Ross Cheit and Barbara R. Binder.

ABSTENTION: J. William W. Harsch.

The draft opinion was not approved, due to a lack of five affirmative votes, and the Petitioner's safe harbor set forth in the draft opinion is withdrawn.

The next advisory opinion was that of Robert Coulter, a member of the Tiverton Town Council. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. The Petitioner advised that it is now a certainty that there will be adverse litigation between the School Committee and the Treasurer, and likely the Council, too. Chair Binder inquired if the language on the bottom of page 4 is explicit enough regarding the Petitioner's fiduciary duty to the Town and confidentiality. Commissioner Magro stated that the Commission only opines on the Code of Ethics, but there may be other obligations not addressed in the opinion. The Petitioner informed that he is an attorney, his wife is a doctor, and that he has spoken with Disciplinary Counsel regarding the issue. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Robert

Coulter, a member of the Tiverton Town Council.

The next advisory opinion was that of Kazem Farhoumand, P.E., a member of the Board of Registration for Professional Engineers. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was not present. In response to Commissioner Cheit, Staff Attorney Stewart stated that the Code does not regulate bias. Commissioner Cheit questioned whether bias would fall under the “or otherwise” language in the Code. He expressed that he does not want the opinion to read that bias or impairment of independence of judgment is just an appearance of impropriety issue. Commissioner Cerullo suggested that perhaps if a person indicates that there is a question as to whether he or she could be objective it would constitute a conflict of interest.

Staff Attorney Stewart informed that the Petitioner repeatedly stated that he sees no reason why he could not be objective. Commission Cheit suggested omitting the language on page 2 urging the Petitioner to avoid the appearance of impropriety and retain the language regarding impairment of independence of judgment. Commissioner Harsch concurred. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To issue an advisory opinion, as amended and attached hereto, to Kazem Farhoumand, P.E., a member of the Board of

Registration for Professional Engineers.

At 10:42 a.m. upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

a.) Motion to approve minutes of Executive Session held on December 21, 2010.

b.) Motion to approve minutes of Executive Session held on January 11, 2011.

**c.) In re: Kathryn E. Leonard,
Complaint No. 2010-13**

d.) Status Update:

**Joseph S. Larisa, Jr. v. Rhode Island Ethics Commission,
Supreme Court No. 10-280-M.P.**

e.) Motion to return to Open Session.

The Commission returned to Open Session at 11:32 a.m., at which time Commissioner Cheit left the meeting.

The next order of business was a motion to seal the minutes of the Executive Session held on January 25, 2011. Upon motion made by Commissioner Murray and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To seal the minutes of the Executive Session held on January 25, 2011.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on December 21, 2010 by unanimous vote; 2) approved minutes of the Executive Session held on January 11, 2011 by unanimous vote; 3) voted 6-2 not to dismiss In re: Kathryn E. Leonard, Complaint No. 2010-13; 4) approved an Informal Resolution & Settlement in the matter of In re: Kathryn E. Leonard, Complaint No. 2010-13, by a 6-2 vote; and 5) received a status update in Joseph S. Larisa, Jr. v. Rhode Island Ethics Commission, Supreme Court No. 10-280-M.P.

The next order of business was Legal Counsel's report on conducting Informal Resolution & Settlement in Executive Session. Legal Counsel Alves informed that he has provided a memorandum addressing the issue of conducting Informal Resolution & Settlement in Executive Session, which had been discussed last year. He concluded that informal dispositions are properly conducted in Executive Session pursuant to the Open Meetings Act, noting the

exception set forth at R.I. Gen. Laws § 42-46-5(4) for investigative proceedings. He also noted that R.I. Gen. Laws § 36-14-12(c)(6) requires the confidentiality of investigative material. Legal Counsel Alves advised that the Commission is discussing the roots of its investigation when it considers a proposed settlement. If the settlement is approved, a detailed written settlement document is made public and the actual disposition is a matter of public record.

Chair Binder stated that Commissioner Cheit had inquired about informal dispositions that occur prior to the filing of an investigative report. Legal Counsel Alves advised that Regulation 1011(a) deals with informal disposition after probable cause, in which case the Commission will have received an investigative report as part of the proceedings. He stated that subsection (c) refers to dispositions under the Administrative Procedures Act, which is broader and can be utilized to resolve cases prior to probable cause. While no written investigative report would be provided to the Commission in informal dispositions conducted prior to probable cause, the discussion would relate to what the Prosecution has found during its investigation. He stated that, whether or not a written investigative report is before the Commission, the settlement discussion would necessarily involve the results of the investigation.

Commissioner Harsch requested that the memorandum be provided to the RIACLU and OCG. Chair Binder noted that the Commission had requested the analysis in Open Session and it was prepared for discussion in Open Session.

At Chair Binder's request, the Director's Report and New Business were continued to the next meeting. At 11:39 a.m., upon motion made by Commissioner Butler and duly seconded by Commissioner Murray, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary